Supreme Court, U.S.
FILED
OCT 7 1994
OFFICE OF THE CLERK

No. 94-457

In The

Supreme Court of the United States

October Term, 1994

ILLINOIS STATE BOARD OF ELECTIONS, *et al.*,

Petitioners,

v.

DENNIS J. HASTERT, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

ARTURO JAUREGUI
MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATION FUND
542 South Dearborn
Chicago, IL 60605
(312) 427-9363

TYRONE C. FAHNER
JAMES D. HOLZHAUER
Counsel of Record
GEORGE J. TZANETOPOULOS
LORI E. LIGHTFOOT
MAYER, BROWN & PLATT
190 South LaSalle
Chicago, IL 60603
(312) 782-0600
Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

OPINIONS BELOW 2

JURISDICTION 2

STATEMENT 2

REASONS FOR DENYING THE PETITION 7

I. THE COURT OF APPEALS CORRECTLY HELD THAT ATTORNEYS' FEES MAY BE AWARDED AGAINST A NOMINAL STATE DEFENDANT ... 8

II. THE COURT OF APPEALS' APPLICATION OF THE "SPECIAL CIRCUMSTANCES" TEST DOES NOT WARRANT SUPREME COURT REVIEW 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES:

Blanchard v. *Bergeron*, 489 U.S. 87 (1989) 6, 14

Coalition for Basic Human Needs v. *King*, 691 F.2d 597 (1st Cir. 1982) 11, 12

Crosby v. *Bowling*, 683 F.2d 1068 (7th Cir. 1982) 8, 11

Farrar v. *Hobby*, 113 S.Ct. 566 (1992) 9

Hensley v. *Eckerhart*, 461 U.S. 424 (1983) 8

Hewitt v. *Helms*, 482 U.S. 755 (1987) 10

Independent Federation of Flight Attendants v. *Zipes*, 491 U.S. 754 (1989) 9

In re Illinois Congressional Districts Reapportionment Cases, 704 F.2d 380 (7th Cir. 1983) 10

In re Illinois Congressional Districts Reapportionment Cases, No. 81-C-3915 (N.D. Ill. Dec. 3, 1981), aff'd *sub nom. Ryan* v. *Otto*, 454 U.S. 1130 (1982) 12

In re Kansas Congressional Districts Reapportionment Cases, 745 F.2d 610 (10th Cir. 1984) 10

International Oceanic Enterprises, Inc. v. *Menton*, 614 F.2d 502 (5th Cir. 1980) 11

Kentucky v. *Graham*, 473 U.S. 159 (1985) 9

Love v. *Deal*, 5 F.3d 1406 (11th Cir. 1993) 10

New York Gaslight Club, Inc. v. *Carey*, 447 U.S. 54 (1980) 8

People ex rel. Scott v. *Kerner*, 32 Ill. 2d 539, 208 N.E.2d 561 (1965) 12

People ex rel. Scott v. *Kerner*, 33 Ill. 2d 460, 211 N.E.2d 736 (1965) 12

TABLE OF AUTHORITIES – Continued

Page

Pitochelli v. *Town of Johnston*, 996 F.2d 1209, 1993 U.S. App. LEXIS 16814 (1st Cir. 1993) 10

Rhodes v. *Stewart*, 488 U.S. 1 (1988) 10

Rose v. *Heintz*, 806 F.2d 389 (2d Cir. 1986) 11

Skolnick v. *State Electoral Board*, 336 F. Supp. 839 (N.D. Ill. 1971) 12

Supreme Court of Virginia v. *Consumers Union*, 446 U.S. 719 (1980) 8, 10

Texas State Teachers Ass'n v. *Garland Independent School District*, 489 U.S. 782 (1989) 9

Venegas v. *Mitchell*, 495 U.S. 82 (1990) 6, 14

Watkins v. *Fordice*, 7 F.3d 453 (5th Cir. 1993) 10

Wilson v. *Stocker*, 819 F.2d 943 (10th Cir. 1987) 11, 12

STATUTES:

42 U.S.C. § 1973*l*(e) ..... *passim*

42 U.S.C. § 1988 ..... *passim*

28 U.S.C. § 1254(1) 2

No. 94-457

In The

Supreme Court of the United States

October Term, 1994

ILLINOIS STATE BOARD OF ELECTIONS, *et al.*,

Petitioners,

v.

DENNIS J. HASTERT, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

Respondents Dennis J. Hastert, Harris Fawell, John E. Porter, Philip M. Crane, Henry J. Hyde, Thomas W. Ewing and Robert H. Michel (hereinafter referred to together as "Respondents" or the "Hastert plaintiffs"), submit this brief in opposition to the petition for a writ of certiorari in this case.[1]

[1] The "Nieves Hispanic plaintiffs," represented in this matter by the Mexican-American Legal Defense and Education Fund, join in this Brief in Opposition.

OPINIONS BELOW

The opinion of the court of appeals (*Pet. App.* 1-29) is reported at 28 F.3d 1430. The memorandum opinion and order of the three-judge district court denying attorneys' fees (*Pet. App.* 55-66) is reported at 794 F. Supp. 254.

JURISDICTION

The original judgment of the court of appeals was entered on December 17, 1993. *Pet. App.* 32. The court of appeals granted rehearing and issued an amended opinion and order on June 1, 1994. *Id.* at 4. By order dated August 29, 1994 Justice Stevens extended the time for filing the petition for certiorari up to and including September 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The issue in this case is whether the federal courts have the authority under two fee-shifting statutes – 42 U.S.C. § 1973*l*(e) and 42 U.S.C. § 1988 – to award attorneys' fees against a nominal state defendant when the state legislature fails to redraw congressional districts as required following a decennial census. The Seventh Circuit, following the decisions of every other court of appeals to consider the issue, held that fees could be awarded against the state defendant. *Pet. App.* 23 & n.16. The court of appeals also held that under the particular

facts of this case, no "special circumstances" existed warranting denial of fees. *Id.* at 22-24. No "special and important reasons" (Sup: Ct. R. 10.1) exist that would justify review of this routine and fact-bound attorneys' fees decision.

1. As a result of the 1990 census, the number of congressional seats apportioned to Illinois decreased from 22 to 20. Under state law, the Illinois legislature was required to develop a congressional redistricting plan by June 30, 1991, but failed to do so. On June 27, 1991 – after it became apparent that the legislature was not going to adopt a redistricting plan before recessing for the summer – the Hastert plaintiffs filed an action seeking: (1) a declaration that the congressional districting plan then in place was unconstitutional; (2) an injunction prohibiting the Illinois State Board of Elections (the "State Board") from conducting the 1992 elections using the existing districts; and (3) a declaration that the statewide redistricting plan that they had prepared be put into effect. *Pet. App.* 5-6.

The Hastert plaintiffs are the Republican Party members of the Illinois congressional delegation. Several other parties subsequently filed similar lawsuits: a group of Hispanic and African-American voters (the "Nieves plaintiffs"); a group acting on behalf of the Democratic Party members of Congress (the "Rosebrook plaintiffs"); a group of voters represented by the Chicago Urban League (the "Chicago Urban League plaintiffs"); U.S. Representatives Cardiss Collins and Charles Hayes and voters from their districts (the "Collins plaintiffs"); and a group affiliated with local NAACP chapters (the "Scott

plaintiffs"). *Pet. App.* 5-7. All of the lawsuits were consolidated with the Hastert action. The Hastert and Nieves plaintiffs joined together to support a single statewide redistricting map. The Scott and Chicago Urban League plaintiffs were interested only in a relatively small portion of the state map, but they also came to support the Hastert plan. *Id.* at 15-19. The Rosebrook and Collins plaintiffs supported a different redistricting plan. *Id.* at 20-22.

2. The three-judge district court issued its decision on the merits on November 6, 1991, adopting the Hastert plan. *Pet. App.* 7. At the very end of its opinion, the court ordered that "all parties to these consolidated cases bear their own costs." 777 F. Supp. at 662. The Hastert, Nieves, Chicago Urban League and Scott plaintiffs filed timely Rule 59(e) motions to alter or amend the judgment, asking the court to award them attorneys' fees against the State Board. The district court denied those motions on January 17, 1992. *Pet. App.* 55-66.

The court held that the Hastert and Nieves plaintiffs were prevailing parties and thus would ordinarily be eligible for fees:

> This court ultimately adopted the congressional district plan submitted by the *Hastert* plaintiffs. The *Nieves* plaintiffs formally adopted the *Hastert* plan and clearly played a critical role in its development. * * * Thus, the adoption of the *Hastert* plan rendered both the *Hastert* and *Nieves* plaintiffs prevailing parties on the significant issues in litigation.

Pet. App. 63. The court held that the Collins, Rosebrook, Scott and Chicago Urban League plaintiffs were not prevailing parties. *Id.* at 61-63.

Even though it held that the Hastert and Nieves plaintiffs were prevailing parties, the district court denied their applications for fees. *Pet. App.* 63-66. The court found that two "special circumstances" existed that would render a fees award unjust: (1) the Hastert and Nieves plaintiffs, as elected officials and community leaders, "do not appear to be drawn from the ranks of the disempowered and financially disadvantaged citizenry that Congress had in mind when enacting §§ 1973*l*(e) and 1988" (*Id.* at 64); and (2) the plaintiffs "shifted" the redistricting dispute to the federal courts and away from the state legislature, where they would have had to bear their own costs. *Id.* at 65. In concluding that the prevailing plaintiffs were not entitled to attorneys' fees, the district court did not rely upon or discuss the status of the State Board as a nominal defendant.

3. The Seventh Circuit reversed. The court of appeals held that the Hastert and Nieves plaintiffs, the groups the district court held to be "prevailing parties," were entitled to attorneys' fees. *Pet. App.* 22-24. The court also held that the Scott and Chicago Urban League plaintiffs were prevailing parties and were entitled to fees. *Id.* at 16-21.

The Seventh Circuit rejected the district court's assertion that fees should be denied because the plaintiffs were not "drawn from the ranks of the disempowered and financially disadvantaged citizenry that Congress had in mind when enacting § 1973*l*(e) and 1988":

> The district court is wrong on this point for two reasons. First, despite the fact that certain of the plaintiffs in this matter were elected officials, there is no evidence that they were particularly wealthy. Second, and more importantly, the Supreme Court has consistently held that a plaintiff's ability to pay for legal representation is not a special circumstance justifying denial of attorneys' fees. See, *e.g.*, *Venegas* v. *Mitchell*, 495 U.S. 82, 87-88 (1990); *Blanchard* v. *Bergeron*, 489 U.S. 87, 94 (1989).

Id. at 22-23. The court of appeals also disagreed with the district court's holding that fees should be denied because the plaintiffs shifted the dispute from the state legislature to the federal courts:

> This * * * is hardly a reason to deny attorneys' fees. It is surely regrettable that the Illinois General Assembly was unable to enact a new congressional district scheme and that the taxpayers of the State of Illinois must now pay for their dereliction. But such is the case whenever the political branches of government fail to vindicate important rights and the affected parties must seek a judicial hearing.

Id. at 23.

In one sentence of a footnote, the Seventh Circuit rejected the State Board's argument that fees should not be assessed against it because it was merely a nominal defendant: "It is of no consequence that the State Board of Elections played no active role in the proceedings and agreed to enforce whatever plan the district court adopted, since fees may be taxed even against entities

whose role is limited to enforcement of regulations they played no role in promulgating." *Pet. App.* 23 n. 16.

REASONS FOR DENYING THE PETITION

In its petition, the State Board raises as its principal argument a point that was little more than an afterthought in the courts below: that fees cannot be awarded against a nominal state defendant that takes no active part in the litigation. The court of appeals dedicated only one sentence in a footnote to that issue, and the district court ignored it entirely. Review of the issue raised by the petition on the scanty record of this case would hardly be prudent.

Even if the court of appeals and the district court had fully considered and discussed the issue raised by the petition, it would not warrant review by this Court. The State Board does not point to any conflict among the circuits on the issue; indeed, it acknowledges that the other redistricting decisions have uniformly awarded fees. *Pet.* 13. The State Board claims that recent attorneys' fees decisions by this Court call for a reexamination of this previously settled issue. However, none of the decisions cited by the State Board address the issue raised by the petition or cast any doubt whatsoever on the propriety of the common practice of awarding fees against nominal state defendants charged with enforcing invalid laws or regulations.

I. THE COURT OF APPEALS CORRECTLY HELD THAT ATTORNEYS' FEES MAY BE AWARDED AGAINST A NOMINAL STATE DEFENDANT.

1. The Civil Rights Attorneys' Fees Act of 1976, 42 U.S.C. § 1988, provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The Voting Rights Act includes a similar provision. 42 U.S.C. § 1973*l*(e). Although these statutes refer to the district court's discretion, this Court has repeatedly held that "the court's discretion to deny a fee award to a prevailing party is narrow." *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 68 (1980). Indeed, "a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983).

The fact that the particular state entity named as the defendant may be regarded as a "nominal and neutral defendant" is not a special circumstance warranting denial of fees. As this Court held in *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719, 739 (1980), "[f]ee awards against enforcement officials are run-of-the-mill occurrences, even though, on occasion, had a state legislature acted or reacted in a different or more timely manner, there would have been no need for a lawsuit or for an injunction." See also *Crosby* v. *Bowling*, 683 F.2d 1068, 1073 (7th Cir. 1982) ("fees can properly be taxed against those whose role is limited to enforcement of regulations that they had no role in promulgating"). The court of appeals' decision is but another of these "run-of-the-mill occurrences."

The State Board argues (*Pet.* 10-12 & n. 5) that several recent decisions of this Court should be interpreted to preclude an award of fees against a "nominal and neutral state defendant" that did not play an active role in the litigation. But none of the cases cited by the State Board address that issue and none call into question the long-settled law allowing fee awards against nominal state defendants. In *Farrar* v. *Hobby*, 113 S.Ct. 566, 575 (1992), the Court held that when a plaintiff seeks substantial compensatory damages, but "recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief," he is not entitled to attorneys' fees. That holding, of course, says nothing about this case, in which the prevailing plaintiffs received all of the relief they sought.

Kentucky v. *Graham*, 473 U.S. 159 (1985), holds that Section 1988 does not provide for a recovery of fees against a government entity when the plaintiff only sues government employees in their personal capacities. The Court emphasized that when government employees are sued in their official capacities, an award of fees is appropriate. 473 U.S. at 164-166. In this case, the State Board and its members were sued in their official capacities, so *Kentucky* v. *Graham* has no application.

Independent Federation of Flight Attendants v. *Zipes*, 491 U.S. 754 (1989), held that fees could not be awarded in a Title VII action against nongovernmental intervenors who did not violate any federal law. *Texas State Teachers Ass'n* v. *Garland Independent School District*, 489 U.S. 782, 791-792 (1989), held that a plaintiff was entitled to "prevailing party" status if it "succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties

sought in bringing suit'." *Rhodes* v. *Stewart*, 488 U.S. 1 (1988), and *Hewitt* v. *Helms*, 482 U.S. 755 (1987), both held that a plaintiff is not a prevailing party if he does not obtain any relief on the merits of his claim. *None* of these decisions have any application to this case; *none* of them decide the attorneys' fees liability of a nominal state defendant; and none of them overrule *sub silentio Supreme Court of Virginia* v. *Consumers Union* or any of the other cases holding that fees may be awarded against nominal state defendants.

2. In light of the settled law that fees can be awarded against nominal state defendants, it is not surprising that in other congressional and legislative redistricting cases – including cases decided after the decisions the State Board relies upon – courts of appeals have routinely awarded attorneys' fees to the prevailing party (*i.e.*, the party responsible for the districting map that was finally adopted by the court). See, *e.g.*, *Watkins* v. *Fordice*, 7 F.3d 453 (5th Cir. 1993); *Love* v. *Deal*, 5 F.3d 1406 (11th Cir. 1993); *Pitochelli* v. *Town of Johnston*, 996 F.2d 1209, 1993 U.S. App. LEXIS 16814 (1st Cir. 1993) (unreported decision); *In re Kansas Congressional Districts Reapportionment Cases*, 745 F.2d 610 (10th Cir. 1984); *In re Illinois Congressional Districts Reapportionment Cases*, 704 F.2d 380 (7th Cir. 1983). Indeed, we are aware of no court of appeals decision holding that an award of fees to the prevailing party in a redistricting case would be unjust, even though redistricting cases are typically brought against nominal state defendants charged with carrying out election laws.

In other contexts, the courts of appeals have agreed that fees may be awarded against nominal state defendants. For example, in *Crosby* v. *Bowling*, 683 F.2d 1068, 1073 (7th Cir. 1982), the Seventh Circuit held that "fees can properly be taxed against those whose role is limited to enforcement of regulations that they had no role in promulgating." In that case, the court of appeals upheld an award of fees against officials of the Illinois Department of Public Aid who claimed that they were merely enforcing federal regulations. The court held that the state defendants' limited authority was not a special circumstance that would make a fee award unjust. "The state defendants appear to overlook the fact that they were named parties to Crosby's suit and that relief was granted against them. * * * [T]he state defendants in the instant case were directly responsible for enforcement of the state regulations of which the plaintiffs complained." *Id.* at 1074. Other courts of appeals have also held that the fact that state or local enforcement officials were "mere functionaries" or did nothing to enforce an unconstitutional statute were not special circumstances that would make a fee award against the state unjust. See, *e.g.*, *Wilson* v. *Stocker*, 819 F.2d 943, 951 (10th Cir. 1987); *Rose* v. *Heintz*, 806 F.2d 389, 392 (2d Cir. 1986); *Coalition for Basic Human Needs* v. *King*, 691 F.2d 597, 602-603 (1st Cir. 1982); *International Oceanic Enterprises, Inc.* v. *Menton*, 614 F.2d 502, 503-504 (5th Cir. 1980).

3. The State Board's petition supplies no good reason for disturbing this uniform line of precedent. The facts of this dispute make it clear that there would be nothing inequitable or unjust about having the State pay plaintiffs' attorneys' fees and costs. The State is obligated

to enact a congressional districting plan that meets the requirements of the Constitution and federal law. The State did not fulfill that obligation. In fact, the Illinois General Assembly has not carried out its congressional redistricting obligations for 30 years.[2] The Hastert plaintiffs were therefore forced to go to court, propose their own map of congressional districts, and litigate with a host of other plaintiffs over what map was "correct". Fee awards are not intended to punish the state, but to compensate plaintiffs for the costs incurred in vindicating important federal rights. *Wilson v. Stocker*, 819 F.2d at 951; *Coalition for Basic Human Needs v. King*, 691 F.2d at 603. Because the prevailing plaintiffs went to court to obtain a valid district map, they are entitled to attorneys' fees.

The State Board is being represented by the Illinois Attorney General in this case; it does not dispute that any fee award would ultimately be paid out of the State Treasury and not out of the pockets of any of the individual defendants. The State cannot avoid its liability for

---

[2] As the district court noted (777 F. Supp. at 641 & n.6), the Illinois General Assembly last enacted a Congressional redistricting plan following the 1960 census, and that plan was held to be unconstitutional. *People ex rel. Scott* v. *Kerner*, 32 Ill. 2d 539, 208 N.E.2d 561 (1965). The legislature did not adopt a new redistricting plan at that point, but instead left the task to the courts. *People ex rel. Scott* v. *Kerner*, 33 Ill. 2d 460, 211 N.E.2d 736 (1965). Following the 1970 census and again following the 1980 census, the legislature failed to adopt a redistricting plan and the courts were required to choose between competing plans. See *Skolnick* v. *State Electoral Board*, 336 F. Supp. 839 (N.D. Ill. 1971); *In re Illinois Congressional Districts Reapportionment Cases*, No. 81-C-3915 (N.D. Ill. Dec. 3, 1981), aff'd *sub nom. Ryan* v. *Otto*, 454 U.S. 1130 (1982).

attorneys' fees by hiding behind the nominal status of the State Board.

The standards developed by this Court, and further developed by the courts of appeal, have withstood the test of time and have served well the congressional intent underlying the enactment of the attorneys' fee statutes. The current standards are simple and fair to all litigants – wealthy and poor alike. Those standards properly focus on the outcome of the litigation. The State Board would have this Court examine instead the role defendants played during the litigation, and the extent to which the nominal state party named as the defendant opposed the relief sought by the plaintiffs. In light of the nature of reapportionment cases, and the myriad of interests involved, that task would be all but impossible to accomplish.

II. THE COURT OF APPEALS' APPLICATION OF THE "SPECIAL CIRCUMSTANCES" TEST DOES NOT WARRANT SUPREME COURT REVIEW.

The State Board's second argument (*Pet.* 14-15) amounts to nothing more than a claim that under the particular facts of this case, the court of appeals misapplied the "special circumstances" test. The Seventh Circuit acknowledged that fees could be denied if "special circumstances" would make an award unjust and agreed that district courts have the discretion to deny fees in appropriate cases. *Pet. App.* 22. Even if the court of appeals misapplied the "special circumstances" test to the fact of this case – and it did not misapply the test – that factual dispute would not warrant review by this Court.

In any event, the Seventh Circuit's rejection of the two "special circumstances" relied upon by the district court is clearly correct. There was no evidence in the record that the plaintiffs were wealthy and able to afford paid counsel, but even if they were this Court has made it clear that the wealth and influence of a prevailing party is not a special circumstance warranty denial of fees. *Venegas v. Mitchell*, 495 U.S. 82, 87-88 (1990); *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989). And, as the court of appeals pointed out (*Pet. App.* 23), the fact that the state legislature could have enacted a valid redistricting plan – something it had not done since the 1950 census – is no more a special circumstance than the fact that legislative bodies could repeal other invalid laws. The State Board's assertion that the plaintiffs "shifted" the dispute to the courts restates the obvious: the parties were required to go to court to vindicate their rights and to accomplish what should have been accomplished by the General Assembly.

The Seventh Circuit properly held that the limited "special circumstances" exception did not apply in this case and that the Hastert and the Nieves plaintiffs obtained not only some, but all of the relief they sought. In these circumstances, the award of attorneys' fees was entirely proper and does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARTURO JAUREGUI
MEXICAN-AMERICAN
LEGAL DEFENSE AND
EDUCATION FUND
542 South Dearborn
Chicago, IL 60605
(312) 427-9363

TYRONE C. FAHNER
JAMES D. HOLZHAUER
Counsel of Record
GEORGE J. TZANETOPOULOS
LORI E. LIGHTFOOT
MAYER, BROWN & PLATT
190 South LaSalle
Chicago, IL 60603
(312) 782-0600

Counsel for Respondents

October 1994